Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM 1976

NO. 76-1645

GENERAL DYNAMICS CORPORATION,
Petitioner

v.

BOB BULLOCK, COMPTROLLER OF PUBLIC ACCOUNTS, ET AL.,
Respondents

PETITION FOR CERTIORARI TO THE SUPREME COURT OF THE STATE OF TEXAS

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SUBJECT INDEX

LIST OF AUTHORITIES

IN THE

Supreme Court of the United States

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NO. _____

GENERAL DYNAMICS CORPORATION,
Petitioner

v.

BOB BULLOCK, COMPTROLLER OF PUBLIC ACCOUNTS, ET AL.,
Respondents

PETITION FOR CERTIORARI TO THE SUPREME COURT OF THE STATE OF TEXAS

Petitioner is a corporation duly incorporated under the laws of the State of Delaware with its executive offices in St. Louis, Missouri. Respondents are the Comptroller of Public Accounts, the Attorney General, and the State Treasurer of the State of Texas.

A writ of certiorari is sought to review a judgment of the Supreme Court of the State of Texas affirming an

intermediate court decision holding that the Texas franchise tax is an "income tax" within the meaning of the Buck Act, 4 U.S.C. §§105 et. seq., and on that basis reversing a trial court judgment for petitioner awarding it recovery of portions of franchise taxes paid under protest.

OPINIONS BELOW

The judgment of the district court of Travis County, Texas, 98th Judicial District, entered on May 2, 1975, held that certain amounts of franchise taxes paid under protest by petitioner had been unlawfully and unconstitutionally collected and authorized the recovery of those sums. The final judgment of the district court is reproduced herein as Exhibit A.

The opinion of the Austin Court of Civil Appeals is reported at 533 S.W.2d 118 and is reproduced herein as Exhibit B.

The majority opinion of the Texas Supreme Court is reported at 547 S.W.2d 255 and is reproduced herein as Exhibit C. A concurring opinion is reproduced herein as Exhibit D. The original dissent of the Chief Justice is reproduced herein as Exhibit E and his revised dissent as Exhibit F.

JURISDICTION

The decision of the Texas Supreme Court was entered on December 31, 1976, and made final by order overruling motion for rehearing entered on February 23, 1977. The jurisdiction of this Court is timely invoked under 28 U.S.C. § 1257(3).

ISSUES PRESENTED

1. Is the Texas franchise tax an "income tax" within the meaning of the Buck Act, 4 U.S.C. §§ 106(a) and 110(c)?

2. Is the state's collection of the franchise tax upon the basis of business done on a Federal enclave in violation of Article I, Section 8, Clause 17, of the Constitution of the United States?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, Section 8, Clause 17, Constitution of the United States:

> "The Congress shall have power . . . To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings; . . ."

The Buck Act, 4 U.S.C. § 106(a):

> "(a) No person shall be relieved from liability for any income tax levied by any State, or by any duly constituted taxing authority therein, having jurisdiction to levy such a tax, by reason of his residing within a Federal area or receiving income from transactions occurring or services performed in such area; and such State or taxing authority shall have full jurisdiction and power to levy and collect

such tax in any Federal area within such State to the same extent and with the same effect as though such area was not a Federal area."

The Buck Act, 4 U.S.C. § 110(c):

"As used in sections 105-109 of this title— . . .

"(c) The term 'income tax' means any tax levied on, with respect to, or measured by, net income, gross income, or gross receipts."

The applicable version of the Texas franchise tax, Articles 12.01 and 12.02, fully reproduced herein as Exhibit G, but here pertinently excerpted as follows:

"Art. 12.01 Base and Rate of Tax

"(1) Except as herein provided, every domestic and foreign corporation heretofore or hereafter chartered or authorized to do business in Texas or doing business in Texas, shall file such reports as are required by Articles 12.08 and 12.19 and pay to the Comptroller a franchise tax for the period from May 1 of each year to and including April 30 of the following year which shall be based on whichever of the following Subsections (a), (b), or (c) shall yield the greatest tax:

"(a) Basic Tax

"(1) Two Dollars and Seventy-five Cents ($2.75) per One Thousand Dollars ($1,000) or fractional part thereof applied to that portion of the sum of the stated capital, surplus and undivided profits, the sum of which for the purposes of this Chapter is hereafter referred to as 'taxable capital,' allocable to Texas in accordance with Article 12.02 of this Chapter.

"As used in this Chapter, the phrase 'stated capital,' shall have the same meaning as defined in Article 1.02 of the Texas Business Corporation Act. . . .

"Art. 12.02 Allocation Formula

"(1) (a) Each corporation liable for payment of a franchise tax shall determine the portion of its entire taxable capital taxable by the State of Texas by multiplying same by an allocation percentage which shall be the percentage relationship which the gross receipts from its business done in Texas bear to the total gross receipts of the corporation from its entire business."

STATEMENT OF THE CASE

Petitioner is a multi-state corporation. For the years in issue in this case it did some business in various towns in Texas, but the vast majority of its operations within the territorial boundaries of the state were conducted on a Federal enclave known as Air Force Plant No. 4.[1] The facts in the case are undisputed. Petitioner protested portions of the franchise taxes assessed against it. The basis of the protest was that respondents had no authority to consider petitioner's operation on the Federal enclave

1. Petitioner has occupied the Air Force Plant No. 4 site since February of 1942 under lease from the United States and has utilized the area solely for operations performed pursuant to government contracts. The area has been a Federal enclave since December 20, 1942, when the Governor of Texas, at the request of the Secretary of War, executed a deed of cession granting "exclusive jurisdiction" to the United States. All of the basic facts are set forth in *Board of Equalization of the City and Independent School District of Fort Worth v. General Dynamics Corporation*, 344 S.W.2d 489 (Tex. Civ. App., Fort Worth, 1961, writ refused, n.r.e.), and the holding there is in complete conformity with *Standard Oil Co. v. People of the State of California*, 291 U.S. 242 (1934), and *Humble Pipeline Co. v. Waggoner*, 376 U.S. 369 (1964); and *United States v. State Tax Commission of Mississippi*, 412 U.S. 363 (1973).

as Texas business in computing its franchise tax.[2] The suit was instituted by petitioner to recover the amounts of franchise taxes paid under protest.

The Texas franchise tax (Exhibit G) is levied on "taxable capital" defined by statute as being composed of "stated capital, surplus and undivided profits." Petitioner and other corporations to which the basic tax is applicable are required to pay the tax on that portion of "taxable capital" which is "allocable to Texas" by a formula derived from the "relationship which gross receipts from . . . business done in Texas bear to the total gross receipts of the corporation from its entire business."

The difference between the parties arose as to the manner in which the business done on the Federal enclave should be treated in deriving the formula for computing petitioner's franchise taxes.[3] Petitioner's position is that

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2. Petitioner has not questioned the validity of the tax itself but sought to recover only those portions of the tax paid under protest as shown by the following table:

Year Paid	Total Franchise Tax Paid	Franchise Tax Paid Under Protest
1968	$356,600.75	$354,820.76
1969	$521,421.69	$516,131.01
1970	$555,375.50	$553,011.50
1971	$591,023.01	$584,793.84

3. The figures which have been subject to consideration in deriving the tax formula are shown below:

Calendar Year	Sales In Texas	Sales on Air Force Plant No. 4 Site	Sales Everywhere
1967	$ 4,357,204	$ 856,463,703	$1,906,633,595
1968	$12,976,270	$1,266,967,855	$2,247,983,430
1969	$ 5,278,512	$1,236,212,362	$2,056,615,373
1970	$10,298,596	$ 967,025,134	$1,752,444,338

the franchise tax is a tax on capital which the state is not permitted by the Buck Act to levy in a Federal enclave and, therefore, that for franchise tax purposes business done on the Federal enclave should not be considered as business done in Texas. The trial court held that the state had no power to impose franchise taxes on the basis of business done on a Federal enclave and ordered recovery of the amounts paid under protest. The Court of Civil Appeals and the Supreme Court recognized the existence of the Federal enclave but held that business done on the Federal enclave could properly be considered as business done in Texas because the Texas franchise tax is an "income tax" within the meaning of and authorized by the Buck Act, 4 U.S.C. §§ 106(a) and 110(e).

The middle of the above column of figures is the subject of the controversy. Gross receipts for enclave business are, of course, included in total gross receipts. The issue is whether business on the Federal enclave should also be treated as business done in Texas for the purpose of the Texas franchise tax formula. By treating business done on the Federal enclave as business done in Texas, respondents added together the first and second columns of figures and fixed the tax on petitioner's taxable capital at 45.1487 per cent for the calendar year 1967, payable in 1968; 56.9374 per cent for the calendar year 1968 payable in 1969; 60.3657 per cent for the calendar year 1969, payable in 1970; and 55.7691 per cent for the calendar year 1970 payable in 1971. If gross receipts from business done on the Federal enclave are included only in sales everywhere and not as business done in Texas, the tax on petitioner's taxable capital for the years involved would be fixed at 0.2285 per cent for the calendar year 1967, payable in 1968; 0.5772 per cent for the calendar year 1968 payable in 1969; 0.2567 per cent for the calendar year 1969 payable in 1970; and 0.5877 per cent for the calendar year 1970 payable in 1971.

REASONS FOR GRANTING THE WRIT

I. The State Court has decided a Federal question of substance in a way not in accord with an applicable decision of this Court.

The state court has decided that business done on a Federal enclave may be considered as business done in Texas for the purpose of determining the portion of a corporation's taxable capital which is taxable by the State of Texas by holding that the Texas franchise tax is an "income tax" within the meaning of the Buck Act, 4 U.S.C. §§ 106(a) and 110(c).

(a) There is a substantial Federal question.

The propriety of levying taxes on business operations conducted on a Federal enclave where exclusive jurisdiction resides in the Federal government under the plain provisions of Article I, Section 8, Clause 17 of the United States Constitution presents a substantial Federal question for decision—*Shell Oil Company v. Mouton*, 410 F.2d 715 (5th Cir. 1969); *Mouton v. Sinclair Oil and Gas Company*, 410 F.2d 717 (5th Cir. 1969), cert. den. 398 U.S. 957.

The fact that a question of state law, the nature of the Texas franchise tax, was determined does not change the character of the right to tax which is totally Federal in that the sole ground for decision was that the Texas franchise tax is an "income tax" as defined in the Buck Act, 4 U.S.C. § 110(c) and, therefore, authorized to be collected by the State by 4 U.S.C. § 106(a)—*J. I. Case Company v. Borak*, 377 U.S. 426 (1964).

(b) The nature of the tax should be determined by Federal law.

The presence or absence of a right to tax under the Buck Act does not depend on state court construction of the taxing measure involved. In *Howard v. Commissioners of Sinking Fund of City of Louisville*, 344 U.S. 624 (1953), this Court explained that "the right to tax earnings within the area was not given Kentucky in accordance with Kentucky law as to what is an income tax" and went on to hold that "the question was whether the tax was an income tax within the meaning of the Federal law" (344 U.S. 628-629). More recently in *First Agricultural National Bank v. State Tax Commission*, 392 U.S. 339 (1968), which involved a statute comparable with the Buck Act in that it granted states certain authority to tax national banks, this Court pointed out that "we are not bound by the state court's characterization of the tax" (392 U.S. 347).

The state court's ruling that the Texas franchise tax is an "income tax" is, therefore, in no way binding on this Court and can properly be viewed only in the light of the circumstances in which it was made.[4] The question is a Federal question and should be answered in conformity with Federal law.

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4. The opinion of the Court of Civil Appeals in the case at bar is the first reported Texas decision characterizing the franchise tax as an income tax. That holding was made in the situation where respondents, as appellants in that Court, sought to retain the franchise taxes paid under protest solely by contending that the Texas franchise tax is an "income tax" within the meaning of the Buck Act. No other possibility of the State's right to the funds in question was even suggested to the Texas appellate courts.

(c) This Court has previously held that the Texas franchise tax is a tax on capital.

The Texas franchise tax which is here before the Court (Exhibit G)[5] is substantially identical with the earlier statutory provisions which were construed by this Court in *Ford Motor Company v. Beauchamp*, 308 U.S. 331 (1940). There this Court characterized the franchise tax as one "for the privilege of carrying on business in Texas" (308 U.S. 334) and as being "based upon the proportion of capital employed in Texas" (308 U.S. 335). It was further specifically held that (308 U.S. 336):

> "In a unitary enterprise, property ouside the state, when correlated in use with property within the state, necessarily affects the worth of the privilege within the state. Financial power inherent in the possession of assets may be applied, with flexibility, at whatever point within or without the state the managers of the business may determine. *For this reason it is held that an entrance fee may be properly measured by capital wherever located.*" (Emphasis added.)

Although the Buck Act was not in existence at the time pertinent to that decision, the nature of the Texas franchise tax has not changed.

(d) The holding of the majority below is in conflict with this Court's decision.

Two of the nine members of the Court below refused to accept the majority holding that the Texas franchise

5. The Exhibit reproduces the version of the provisions which is controlling in the case at bar. Later amendments to Article 12.01 (Acts 1975, 64th Leg., Ch. 719, p. 2310) increased the rate of tax and made other additions of no significance to the case at bar. The nature of the tax has not been changed.

tax is an "income tax." The concurring opinion (Exhibit D, p. 37) opens with the statement that "I do not regard the Texas franchise tax as an income tax within the meaning of the Buck Act."[6] The Chief Justice in his original dissenting opinion (Exhibit E, p. 39) pointed out that:

> "The Congress has, in the Buck Act, authorized the collection by the states *only* of *income taxes* on revenues derived from the federal enclaves. The definition of 'income tax' is broad; but it does not include a tax on capital. This Court made that distinction in *Humble Oil & Refining Co. v. Calvert*, 478 S.W.2d 926 (1972)."

In his revised dissent, the Chief Justice expanded his distinction of the court's earlier decision which the majority interpreted as supporting the conclusion reached. He explained that (Exhibit F, p. 41):

> "While in *Humble* the tax was called an 'occupation tax,' the tax was based upon the market value of oil and gas as produced. When oil and gas are produced and have a value (as they do) there is an inflow of wealth, an accretion to wealth, and an economic gain. This, we said, 'is the essence of an income tax.' 478 S.W.2d at 931. We therefore concluded in *Humble* that the tax on this economic gain or inflow of wealth, by whatever name, was an 'income tax' within the meaning of the Buck Act. We

6. The concurrence is based upon a ground not even asserted by respondents. It is totally inconsistent in first recognizing the nature of the Federal enclave and then disregarding it apparently on the ground that petitioner does business in Texas other than in the Federal enclave. The conclusion reached is conflicting and inconsistent with this Court's decisions in *Collins v. Yosemite Park*, 304 U.S. 518 (1938); *James v. Dravo Contracting Company*, 305 U.S. 134 (1937); *United States v. Unzeuta*, 281 U.S. 138 (1930); and *Surplus Trading Company v. Cook*, 281 U.S. 647 (1930); and *United States v. State Tax Commission of Mississippi*, 412 U.S. 363 (1973).

held that the oil and gas when produced, and upon which the tax was levied, 'could be considered as the money, or money's worth, which comes during a definite period. *It is to be distinguished from capital,* which is a fund of wealth at a particular time.'

"The *substance* of the tax sought to be collected in *this* case is upon the stated *capital, surplus and undivided profits* of the corporation. By no stretch of the imagination could it be said to be a tax on any inflow of wealth or upon economic gain.

"The fact that the formula for the amount of the tax which is to be paid has in it the factor of the amount of gross receipts does not, in my opinio , change it from a tax on capital into an income tax."

The majority (Exhibit C, p. 29) not only misinterpreted *Humble Oil and Refining Company v. Calvert,* 478 S.W. 2d 926, cert. den. 409 U.S. 967 (1972), but it also substantially disregarded this Court's construction of the franchise tax in *Ford Motor Company v. Beauchamp,* 308 U.S. 331 (1939). The decision is cited only twice, the first time for the statement that the Texas franchise tax "is obviously payment for the privilege of carrying on business in Texas" and the second as basis for the quotation that the tax is "based upon the proportion of the capital employed in Texas, calculated by the percentage of sales which are within the State."

Purporting to paraphrase the second of those holdings, the majority completely distorts the meaning of the words used by concluding that "the Texas franchise tax is one 'levied on' capital *but* 'measured by . . . gross receipts.'" (emphasis added.)

The phrase, "levied on," may be substituted for "based on." and "measured by," for "calculated by," but the

assumed rephraseology totally disregards this Court's careful explanation that the tax is based upon "the proportion of capital" and the fact that as used by this Court the word "calculated" modified "proportion." By adding the disjunctive "but" for which there is no equivalent in the actual holding, the majority has assumed to conclude that this Court found the Texas franchise tax itself—rather than "the proportion of capital"—to be "calculated by" or "measured by" gross receipts. Not even the excerpt from the sentence used is grammatically subject to the interpretation placed upon it, and clearly the opinion as a whole cannot be so construed. As noted above, this Court expressly held that the Texas franchise tax is "measured by capital."

A tax cannot be both "measured by" capital and "measured by" income or gross receipts as the term "measured by" is used in the Buck Act definition. It is elementary that capital and income or gross receipts represent totally different concepts. The Buck Act authorizes state taxation based upon income or gross receipts, but it did not go so far as to permit the states to tax capital utilized on a Federal enclave. The majority below, in order to retain state possession of the taxes paid under protest, has held that the Texas franchise tax is "measured by gross receipts," but that holding is definitely inconsistent, if not conflicting, with this Court's holding that the Texas franchise tax is "measured by capital."

II. The Court below has decided a Federal question of substance not heretofore decided by this Court.

As an alternative ground for holding that the Texas franchise tax is an "income tax" within the meaning of

the Buck Act, the majority below concluded that "the privilege to transact business in Texas represents income" (Exhibit C, p. 29). The concept is unique.

Franchise taxes are universally recognized as being levied for the privilege of doing business, but it is equally well established that income is only one of several different bases used by various states for computing franchise taxes; "such taxes may be graduated according to the corporation's capital strength, business done, value of property, capital stock, or net income"—84 C.J.S. 268, § 134e. The alternative ground for the majority decision below is in effect a holding that all franchise taxes—regardless of base—are Buck Act "income" taxes. This Court has never so held.

This Court's only opinion on the income tax provision in the Buck Act is *Howard v. Commissioners of Sinking Fund of City of Louisville*, 344 U.S. 624 (1953). No strained or distorted construction was there required as a basis for holding that the tax was an income tax. The ordinance was described as being "measured by one per cent of all salaries, wages and commissions" and was quoted in full as substantiation of that description.[7] That

7. 344 U.S. 625, Ftn. 2: " 'On and after July 1, 1950, every person, association, corporation, or other entity engaged in any occupation, trade, profession, or other activity in the City shall pay into the Sinking Fund of the City for the purposes set forth under Section 91.200 of the Kentucky Revised Statutes as amended by an Act of the General Assembly of 1950, an annual license fee for the privilege of engaging in said activities, *which license fee shall be measured by one per centum of (a) all salaries, wages, commissions and other compensation earned* by every person in the City for work done or services performed or rendered in the City; *and (b) the net profits of all businesses, professions, or occupations from activities conducted* in the City.' Ordinance 83, Series 1050, City of Louisville." (Emphasis added.)

tax was clearly within the Buck Act definition as being "levied on, with respect to, or measured by, net income, gross income or gross receipts." The decision provides no support for the majority holding below that all franchise taxes are Buck Act income taxes. The majority of the Texas Supreme Court has, therefore, decided a federal question of substance not heretofore decided by this Court.

III. The decision below has the effect of usurping the constitutional authority of Congress to legislate over Federal lands.

The majority holdings below distort both Texas and Federal law in a blatant attempt to retain tax revenue unlawfully and unconstitutionally collected.

Prior to the passage of the Buck Act, Article I, Section 8, Clause 17, of the Constitution of the United States was held to prohibit state taxation of either privately owned personal property or privately conducted business operations on a Federal enclave—*Surplus Trading Company v. Cook*, 281 U.S. 647 (1930); *Standard Oil Co. v. People of the State of California*, 291 U.S. 242 (1934). By the Buck Act, Congress relinquished a portion of its exclusive jurisdiction over Federal areas by granting to the states certain specific taxing powers. The Buck Act does not authorize states to collect franchise taxes, but if the Texas franchise tax which is "measured by capital wherever located" as this Court held, is also an income tax "measured by gross receipts," as the majority below held, it is difficult to conceive of any State revenue measure which some comparably motivated state court would be unable to find authority for in the Buck Act.

The provisions enacted by Congress should not be enlarged by judicial fiat. That was the conclusion reached in *Mississippi River Fuel Corporation v. Cocreham*, 382 F.2d 929 (5th Cir. 1967) reh. den. 390 F.2d 34, cert. den., *Mouton v. Mississippi River Fuel Corporation*, 390 U.S. 1015 (1968). The situation there was substantially parallel with that here. In *Humble Pipe Line Co. v. Waggoner*, 376 U.S. 369 (1964), this Court had held that Barksdale Field was a Federal enclave and that the State of Louisiana had no power to levy ad valorem taxes on privately owned personal property located thereon. It was similarly held in *Board of Equalization of the City and Independent School District of Fort Worth v. General Dynamics Corporation*, 344 S.W.2d 489 (Tex. Civ. App., Fort Worth, 1961, writ refused, n.r.e.), that the area on which petitioner conducts its operations is a Federal enclave and that the Texas local governmental bodies had no power to levy ad valorem taxes on privately owned personal property located thereon.

After this Court's decision in the *Humble Pipe Line* case, another corporation paid under protest a severance tax assessed on minerals produced in the Barksdale Field area. The district court adopted the State's contention that the Louisiana severance tax was a Buck Act "income tax," but the intermediate court reversed and ordered that the taxes there paid under protest be refunded. In doing so that Court in the *Mississippi River Fuel Corporation* case first held that (382 F.2d 931):

> "When the United States acquired title to the land, it acquired 'exclusive jurisdiction' over the property, precluding the State's levying and collecting a tax on oil and gas severed from the land by a third party under a lease from the United States. Article I, Section 8, Clause 17, United States Constitution; Humble Pipe Line Co. v. Waggonner, 1964, 376 U.S. 360, 84 S.Ct. 857, 11 L.Ed.2d 782."

Specifically rejecting the contention that the Louisiana severence tax was an "income tax" within the meaning of the Buck Act, the Fifth Circuit further noted that (382 F.2d 939-940):

> "The portion of the Buck Act on which the Collector relies provides that a state may levy an income tax in a federal enclave within the state to the same extent as if the area were not a federal enclave. 4 U.S.C.A. § 106. The Act defines 'income tax' as 'any tax levied on, with respect to, or measured by, net income, gross income, or gross receipts.' 4 U.S. C.A. § 110(c). The Louisiana severance tax is 'levied upon all natural resources severed from the soil * * * including * * * minerals such as oil [and] gas * * *," LSA-R.S. 47:631, and is measured by the quantity of minerals severed, LSA-R.S. 47:633. Congress has authorized the states to impose an income tax on private persons in federal enclaves, *but the Louisiana severance tax is simply not an income tax. We are not free to expand the technical and precise language that Congress has used.*" (Emphasis added.)

That decision was followed in *Shell Oil Company v. Mouton*, 410 F.2d 715 (5th Cir. 1969), and in the companion case of *Mouton v. Sinclair Oil and Gas Company*, 410 F.2d 717 (5th Cir. 1969), cert. den. 398 U.S. 957 (1970).

The majority of the Texas Court below has done exactly what the Fifth Circuit refused to do. It has expanded the words used by Congress to include a franchise tax "measured by capital." Such expansion, if

sustained or perpetuated, would negate—at least to the extent of state taxation—the "exclusive jurisdiction" conferred upon Congress by Article I, Section 8, Clause 17, of the Constitution of the United States.

CONCLUSION

Only this Court can halt state encroachment upon the areas over which the Constitution grants "exclusive jurisdiction" to the Congress. The Buck Act was not intended to be nor can it reasonably be construed as a blanket grant of taxing power to the states. The majority opinion below interprets the Texas franchise tax in a manner not in accord with this Court's construction of the same taxing provisions. The Texas court has further assumed to decide that all franchise taxes are Buck Act "income" taxes, an issue which has not previously been presented to this Court. Neither conclusion is supported by authority. Failure to correct those erroneous holdings would open the door to any and all types of state taxation on Federal enclaves.

PRAYER

Petitioner, therefore, prays that this petition for writ of certiorari be granted.

Respectfully submitted,

MARY JOE CARROLL

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Attorneys for Petitioners

CERTIFICATE OF SERVICE

I, Mary Joe Carroll, a member of the Bar of the Supreme Court of the United States, hereby certify that I have served the foregoing petition for certiorari on counsel for respondents by depositing same in the United States mail, postage prepaid, on May ____, 1977, addressed to The Honorable John L. Hill, Attorney General of Texas, and to Messrs. David M. Kendall, J. H. Broadhurst, and R. L. Lattimore, Assistant Attorneys General, P.O. Box 12548, Capitol Station, Austin, Texas 78711.

MARY JOE CARROLL

EXHIBIT A

NO. 167,272

IN THE DISTRICT COURT
OF TRAVIS COUNTY, TEXAS
98TH JUDICIAL DISTRICT

GENERAL DYNAMICS CORPORATION

vs.

ROBERT S. CALVERT, COMPTROLLER OF PUBLIC ACCOUNTS OF THE STATE OF TEXAS, ET AL

FINAL JUDGMENT

On the 29th day of January, 1973, came on to be heard this cause on its merits before the Court without a jury, and the Court having considered Defendants' Plea to the Jurisdiction, the pleadings in said cause, and the evidence presented at the hearing on the Plea to the Jurisdiction, and the Court having considered the Plaintiff's and Defendants' briefs and the arguments on the Defendants' Plea to the Jurisdiction and the merits of the case, and the Court being of the opinion that the Plea to the Jurisdiction should in all things be overruled, and that the assessment and collection of taxes was unlawful, unconstitutional, wrongful and void for all the reasons aforesaid, and that the Comptroller of Public Accounts of the State of Texas was not and is not lawfully entitled to assess, demand or collect the same from Plaintiff; that Plaintiff should recover from Defendants the following monies: $354,221.15 with interest thereon from April 29, 1968; $599.61 with interest thereon from June 21,

1968, $448,684.25 with interest thereon from April 28, 1969; $67,446.76 with interest thereon from October 16, 1969; $553,011.50 with interest thereon from June 15, 1970; $441,442.75 with interest thereon from June 10, 1971; and $143,351.09 with interest thereon from July 26, 1971; it is accordingly

ORDERED, ADJUDGED AND DECREED that the Plea to the Jurisdiction of Defendants is hereby in all things overruled and that Plaintiff have and recover from the Defendants the following monies: $354,221.15 with interest thereon from April 29, 1968; $599.61 with interest thereon from June 21, 1968; $448,684.25 with interest thereon from April 28, 1969; $67,446.76 with interest thereon from October 16, 1969; $553,011.50 with interest thereon from June 15, 1970; $441,442.75 with interest thereon from June 10, 1971; and $143,351.09 with interest thereon from July 26, 1971;

TO WHICH FINAL JUDGMENT of the Court the Defendants duly except.

ENTERED AND ORDERED on this 2nd day of May, 1975.

/s/ HERMAN JONES
Judge Presiding

EXHIBIT B

IN THE COURT OF CIVIL APPEALS
THIRD SUPREME JUDICIAL DISTRICT
OF TEXAS, AT AUSTIN

NO. 12,350

BOB BULLOCK, COMPTROLLER OF PUBLIC ACCOUNTS OF THE STATE OF TEXAS, ET AL.,
Appellants

vs.

GENERAL DYNAMICS CORPORATION,
Appellee

FROM THE DISTRICT COURT OF TRAVIS COUNTY, 98TH JUDICIAL DISTRICT
NO. 167,272, HONORABLE HERMAN JONES, JUDGE PRESIDING

General Dynamics Corporation brought this action in district court of Travis County to recover in excess of $2,000,000 in franchise taxes paid to the State of Texas under protest for the years 1968 through 1971.

General Dynamics is engaged primarily in manufacture and sales of defense equipment and supplies, and during the taxable years its operations were performed in Waco, San Antonio, Houston, and Daingerfield, as well as within a federal enclave in Tarrant County consisting of about

428 acres of land known as Air Force Plant No. 4 site, which is leased to the corporation.

The taxes arose out of operations of General Dynamics in Texas, including for computation purposes the gross receipts from the corporation's operations within the federal enclave in Tarrant County. That portion of the taxes measured by gross receipts attributed to the enclave business constitutes the matter litigated in this cause.

The trial court sitting without a jury held that General Dynamics should recover all such taxes, amounting to $2,008,757.11, computed on the gross receipts from the corporation's operation within the enclave, together with interest on each payment from the date paid.

The State, through proper representatives, has appealed. We will reverse the judgment of the trial court and will render judgment that General Dynamics take nothing by its suit.

The State presents a single point of error:

"The trial court erred in voiding the franchise tax assessed against the percentage of appellee corporation's taxable capital measured by its gross receipts from business done in a federal enclave situated within the State . . . because such allocation is permitted under Article 12.02, Title 122A, Taxation-General, V.T.C.S., and the Buck Act, 4 USCA, Sections 105-110."

The State contends, and we agree with the contention, that the holding of the Supreme Court in Humble Oil and Refining Company v. Calvert, 478 S.W.2d 926 (Tex. Sup. 1972), is controlling of decision in this appeal. In that case the oil company sought to recover occupation taxes paid on production from leases on a federal enclave.

The Supreme Court held that the company was not exempt from the tax, its imposition by the State being authorized under the Buck Act. Although in that case an *occupation* tax was involved, we conclude that the Supreme Court's analysis of the Buck Act demonstrates that scope of the Act is sufficiently broad to include *franchise* taxes involved in this appeal.

Congress enacted the Buck Act in 1940 to enable states to impose certain taxes, including "income taxes," on business conducted within federal enclaves. The Act defines "income taxes" in broad terms to mean ". . . any tax levied on, with respect to, or measured by, net income, gross income, or gross receipts." 4 USCA sec. 110(c), as amended 1947.

The Supreme Court, in Humble Oil and Refining Company v. Calvert, *supra*, noted the intent of Congress in this language:

> "The Congressional intent is strongly stated in the bill's Senate Report [Report of Senate Finance Committee, cited in footnote 2, 478 S.W.2d 929] where it is stated that '[t]his definition [of income tax] . . . must of necessity cover a broad field because of the great variations to be found between the different State laws. The intent of your committee in laying down such a broad definition was to include therein any State tax (whether known as a *corporate-franchise tax*, or business-privilege tax, *or any other name*) *if it is levied on*, with respect to, *or measured by* net income, gross income, or *gross receipts*.'" (Emphasis added by this Court)

General Dynamics argues that the Texas statutes by their terms merely tax stated capital and therefore the

franchise tax is not one measured by income so as to come within the definition contained in the Buck Act. We find that analysis of the statutes fails to sustain this contention.

Article 12.01 states: "(1) . . . every domestic and foreign corporation . . . chartered or authorized to do business in Texas or doing business in Texas, shall . . . pay to the Comptroller a franchise tax . . . which shall be based on . . . (a) (i) Two Dollars and Seventy-five Cents ($2.75) per One Thousand Dollars ($1,000) . . . applied to that portion of the sum of the *stated capital, surplus* and *undivided profits*, the sum of which for the purposes of this Chapter is hereafter referred to as *'taxable capital'* . . ." (Emphasis added)

This statute clearly demonstrates that the tax is based upon the three elements of stated capital, surplus, and undivided profits, with the result that the franchise tax will vary in direct proportion to changes in gross income or gross receipts as set out in the Buck Act.

Article 12.02 states: "(1)(a) Each corporation . . . shall determine the portion of its entire *taxable capital* taxable by the State of Texas by multiplying same by an allocation percentage which shall be the percentage relationship which the *gross receipts* from its business done in Texas bear to the *total gross receipts* of the corporation from its entire business." (Emphasis added)

By this article the Legislature merely allocated the taxable capital based upon the intrastate transactions, and the amount of income within Texas will determine what percentage of taxable capital is subject to the franchise tax.

General Dynamics relies upon the holding of the Supreme Court of the United States in Ford Motor Company v. Beauchamp, 308 U.S. 331, 60 S.Ct. 273, 84 L.Ed. 304 (1940), affirming Ford Motor Company v. Clark, 100 F.2d 515 (5th Cir.), in contending that the Texas franchise tax is a tax on capital as distinguished from income. This case was decided in 1939, rehearing denied in January, 1940, and of course does not purport to construe the measures provided in the Buck Act.

But in *Clark* the court observed that "The tax is not laid on property or income, though both are regarded in *measuring it*." (100 F.2d 516) (Emphasis added) The Buck Act, as already noted, defines "income tax" in terms of a tax "measured by" either "net income, gross income, or gross receipts." In *Beauchamp* The Supreme Court stated: "The statute calls the excise a franchise tax. It is obviously payment for the *privilege of carrying on business* in Texas." (308 U.S. 334; 60 S.Ct. 275) (Emphasis added) The legislative intent of the Buck Act, under its "broad definition was to include . . . any State tax (whether known as a corporate-franchise tax, or *business-privilege tax*, or any other name) . . ." (478 S.W.2d 929) (Emphasis added)

We conclude that the principles of law applied by the Supreme Court of Texas to the oil and gas production tax are applicable with equal force to the franchise tax, for the reason that the definition of "income tax" contained in the Buck Act encompasses business-privilege taxes in both instances because each tax relates to and is measured by income or receipts. The trial court erred in its conclusion that "the assessment and collection of taxes was unlawful, unconstitutional, wrongful and void."

The judgment of the trial court is in all things reversed. Judgment is here rendered that appellee, General Dynamics Corporation, take nothing by its suit, and that all costs be assessed against the appellee.

Trueman E. O'Quinn,
Associate Justice

Reversed and Rendered

Filed: January 28, 1976

EXHIBIT C

IN THE SUPREME COURT OF TEXAS

NO. B-5887

GENERAL DYNAMICS CORPORATION,
Petitioner,

v.

BOB BULLOCK, COMPTROLLER, et al.,
Respondents.

FROM TRAVIS COUNTY,
THIRD DISTRICT.

General Dynamics Corporation brought this action to recover in excess of $2 million in franchise taxes paid pursuant to Article 12.01, *et seq.*, Texas Taxation-General Annotated, to the State of Texas under protest for the years 1968 through 1971. General Dynamics maintained that this tax was not included within the Buck Act, United States Code Annotated, Title 4, Sections 105-110, and therefore could not be collected with respect to activities occurring within a federal enclave. The trial court, sitting without a jury, held that General Dynamics was entitled to recover these taxes. The court of civil appeals reversed and rendered. 533 S.W.2d 118. We affirm.

General Dynamics is a private corporation primarily engaged in the manufacture and sale of defense equipment and supplies. The Corporation conducts business at several locations in Texas, though the majority of its operations occurred on a federal enclave in Tarrant County which consists of about 428 acres of land known

as Air Force Plant No. 4 Site. The land was leased to the Corporation by the federal government.

The dispute arose over the classification by the State of the gross receipts from General Dynamics' operations within the federal enclave in Tarrant County as gross receipts arising in Texas. The Buck Act[1] permits a state to collect an "income tax"[2] on business activities, such as those of General Dynamics, within a federal enclave. The State contended that the Texas franchise tax[3] is an

1. Section 106(a) of the Buck Act specifies:
"No person shall be relieved from liability for any income tax levied by any State, or by any duly constituted taxing authority therein, having jurisdiction to levy such a tax, by reason of his residing within a Federal area or receiving income from transactions occurring or services performed in such area; and such State or taxing authority shall have full jurisdiction and power to levy and collect such tax in any Federal area within such State to the same extent and with the same effect as though such area was not a Federal area."

2. Section 110(c) of the Buck Act defines the term "income tax" as follows:
"The term 'income tax' means any tax levied on, with respect to, or measured by, net income, gross income, or gross receipts."

3. Article 12.01, Texas Taxation-General Annotated, reads as follows:
"(1) Except as herein provided, every domestic and foreign corporation heretofore or hereafter chartered or authorized to do business in Texas or doing business in Texas, shall file such reports as are required by Articles 12.08 and 12.19 and pay to the Comptroller a franchise tax for the period from May 1 of each year to and including April 30 of the following year which shall be based on whichever of the following Subsections (a), (b), or (c) shall yield the greatest tax:
"(a) Basic Tax
"(i) Two Dollars and Seventy-five Cents ($2.75) per One Thousand Dollars ($1,000) or fractional part thereof applied to that *portion of the sum of the stated capital, surplus and undivided profits,* the sum of which for the purposes of this Chapter is hereafter referred to as 'taxable capital,' *allocable to Texas* in accordance with Article 12.02 of this Chapter.

"income tax" within the meaning of the Buck Act and, therefore, the taxes were due.

The single question to be resolved is whether the Texas franchise tax paid by General Dynamics is an "income tax" under the Buck Act and may be levied for business conducted on a federal enclave.

The court of civil appeals held that this court's decision in *Humble Oil & Refining Company v. Calvert,* 478 S.W. 2d 926, *cert. denied,* 409 U.S. 967 (1972), controlled the decision, that the tax levied in the instant case was an "income tax" as that term is used in the Buck Act, and

"As used in this Chapter, the phrase 'stated capital' shall have the same meaning as defined in Article 1.02 of the Texas Business Corporation Act." [Emphasis added.]
Article 12.02, Texas Taxation-General Annotated, reads in pertinent part as follows:
"(1)(a) Each corporation liable for payment of a franchise tax shall determine the portion of its entire taxable capital taxable by the State of Texas by multiplying same by an allocation percentage which shall be the percentage relationship which the gross receipts from its business done in Texas bear to the total gross receipts of the corporation from its entire business."
Article 1.02, Texas Business Corporation Act Annotated, defines "stated capital" as follows:
"(11) 'Stated capital' means, at any particular time, the sum of:
"(a) the par value of all shares of the corporation having a par value that have been issued,
"(b) the consideration fixed by the corporation in the manner provided by law for all shares of the corporation without par value that have been issued, except such part of the consideration actually received therefor as may have been allocated to capital surplus in a manner permitted by law, and
"(c) such amounts not included in paragraphs (a) and (b) of this subsection as have been transferred to stated capital of the corporation, whether upon the issue of shares as a share dividend or otherwise, minus all reductions from such sum as have been effected in a manner permitted by law."
Article 1.02 of the Texas Business Corporation Act Annotated defines "surplus" as follows: ". . . the excess of the net assets of a corporation over its stated capital."

that the State could therefore classify the gross receipts derived from the federal enclave as part of the gross receipts resulting from business activities in Texas.

Federal law governs the question of whether a tax is an "income tax" within the meaning of the Buck Act. *Howard v. Commissioners of Louisville*, 344 U.S. 624 (1953). When previously interpreting the Buck Act, this court has noted:

> "The Congressional intent is strongly stated in the bill's Senate Report where it is stated that '[t]his definition [of income tax] . . . must of necessity cover a broad field because of the great variations to be found between the different State laws. The intent of your committee in laying down such a broad definition was to include therein *any State tax* (whether known as a corporate-franchise tax, or business-privilege tax, or any other name) *if it is levied on, with respect to, or measured by net income, gross income, or gross receipts.*'" *Humble Oil & Refining Company v. Calvert, supra*, at 929. [Emphasis added.]

Thus, this court must not only apply federal law but also interpret the Buck Act in light of the recognized congressional intent.

With respect to the Texas franchise tax, the courts of this state have held that it "is not a tax upon the property of the corporation nor one upon its income, though both are to be regarded in measuring such tax, but a charge made by the state against the corporation for the privilege granted it to do business in this state. . . . [I]t was the purpose of the Legislature to levy against the corporation a tax commensurate with the value of the privilege granted. . . ." *United North & South Development Co. v. Heath*, 78 S.W.2d 650, 652 (Tex. Civ. App.—Austin 1934, writ ref'd). *Accord, Riveroaks Development Corp. v. Shepperd*, 246 S.W.2d 236, 240 (Tex. Civ. App.—Austin 1952, writ ref'd); *Sterling Oil & Refining Corporation v. Isbell*, 202 S.W.2d 300, 302 (Tex. Civ. App.—Austin 1947, no writ); *Houston Oil Co. of Texas v. Lawson*, 175 S.W.2d 716, 723 (Tex. Civ. App.—Galveston 1943, writ ref'd).

The United States Supreme Court, citing the Texas decision in *United North & South Development Co. v. Heath, supra*, has held that the Texas franchise tax "is obviously payment for the privilege of carrying on business in Texas." *Ford Motor Co. v. Beauchamp*, 308 U.S. 331, 334 (1939).

The United States Supreme Court cases, *Commissioner v. Glenshaw Glass Co.*, 348 U.S. 426, 431 (1955), and *Old Colony Trust Co. v. Commissioner of Int. Rev.*, 279 U.S. 716 (1929), cited in the case of *Humble Oil & Refining Company v. Calvert, supra*, indicates that the federal courts would agree with the analysis of this court in that case as to what "income tax" means under the Buck Act. This court wrote:

> "If the tax in question is based upon income and is measured by that income in money or money's worth, as a net income tax, gross income tax, or gross receipts tax, it is an 'income tax.'" 478 S.W.2d 926 at 930.

This court further described "income" as "an accession to wealth in the form of economic benefit, value in money or money's worth." 478 S.W.2d 926 at 930. Under the analysis in *Humble Oil & Refining Company v. Calvert,*

supra, the granting of the privilege to transact business in the State of Texas represents the realization of gross income to the General Dynamics Corporation because an economic benefit flows to the Corporation.

These economic benefits which flow from the granting of the privilege include the opportunity to transact intrastate business and the right to invoke the protection of the local government. *Ford Motor Co. v. Beauchamp, supra*, at 334-35. The formula used in the franchise tax is the valuation of the privilege granted by the Legislature. *United North & South Development Co. v. Heath, supra; Riveroaks Development Corp. v. Shepperd, supra.* Accordingly, the franchise tax can be viewed as a tax levied on the economic benefit which flows to General Dynamics Corporation as a result of the granting of the privilege to transact business in Texas.

The proposition that an economic benefit is received and that income is realized by the granting of a franchise is not a unique one. The federal courts have held that extension of a street railway franchise by a city in exchange for a bridge may result in the realization of a capital gain or loss, *Philadelphia Park Amusement Co. v. United States*, 126 F. Supp. 184 (Ct. Cl. 1954), and that the sale of a franchise can generate capital gains, *Baxter v. C.I.R.*, 433 F.2d 757 (9th Cir. 1970), *Coca-Cola Bottling Co.*, 22 B.T.A. 686 (1931). Similarly, the federal courts have held that a loss may be realized when a franchise is terminated. The loss of an exclusive sales franchise, *United States v. Hardy*, 74 F.2d 841 (4th Cir. 1935), and the loss of the right to renew a liquor license due to Prohibition, *Elston Co. v. United States*, 21 F. Supp. 267 (Ct. Cl. 1937), *Best Brewery Co.*, 16 B.T.A. 1354 (1929), *McAvoy Company*, 10 B.T.A. 1017 (1928),

William Zakon, 7 B.T.A. 687 (1927), have been allowed as deductions from gross income.

Furthermore, an analysis in terms of the formula employed by the State of Texas also leads to the conclusion that the franchise tax is an "income tax" within the meaning of the Buck Act.

The term "income tax" "means any tax *levied on, with respect to, or measured by, net income, gross income, or gross receipts.*" Section 110 of the Buck Act. [Emphasis added.]

Federal courts have described the Texas franchise tax in various terms. In *Southern Realty Corporation v. McCallum*, 65 F.2d 934, 935-36, *cert. denied*, 290 U.S. 692 (1933), the court wrote:

> *"The* [corporate franchise] *tax is not laid on property or on income, though both are regarded in measuring it."*[4] [Emphasis added.]

4. The full description of the Texas franchise tax made in *Southern Realty Corporation v. McCallum, supra*, at 935-36, is as follows:

> *"The* [corporate franchise] *tax is not laid on property or on income, though both are regarded in measuring it.* It is laid on the privilege granted to the corporation, whether domestic or foreign, to do business for one year in Texas with the capital set-up which it has chosen to use. *The tax for this opportunity to do the year's business is directly measured by the business capital about to be used rather than by the income which it may afterwards appear was realized.* The origin, form, and location of that capital, whether in or out of the state, is unimportant, provided it is to contribute to the corporation's business power within the state. When the corporation is to do business in other states also, avoidance of a trespass on interstate commerce or on that done beyond the territorial jurisdiction of the taxing state is secured by apportioning the business potency of the corporation represented by its business capital according to the business actually done during the preceding calendar year in the taxing state as indicated by gross receipts, compared with all its business everywhere." [Emphasis added.]

The fifth circuit has also written that the Texas franchise tax is *"graduated according to capital strength of the corporation,* which is its business potency." *Ford Motor Co. v. Clark,* 100 F.2d 515, 517 (1938), *aff'd,* 308 U.S. 331 (1939). [Emphasis added.] Finally, in *Ford Motor Co. v. Beauchamp, supra,* at 335, the United States Supreme Court wrote that the franchise tax was *"based upon the proportion of the capital employed in Texas, calculated by the percentage of sales which are within the state."* [Emphasis added.] On the basis of the language employed by the federal courts, it can be reasonably concluded that the Texas franchise tax is one "levied on" capital but "measured by . . . gross receipts." Given the specific wording of the Buck Act, Section 110(c), and the congressional intent that the term "income tax" should include "any State tax . . . *measured by . . . gross receipts,*" it is reasonable to view the Texas franchise tax as an "income tax" within the meaning of the Buck Act. [Emphasis added.]

We hold that the Texas franchise tax is an "income tax" within the meaning of the Buck Act either because the privilege to transact business in Texas represents income or because the tax is "measured by gross receipts."

The judgment of the court of civil appeals is affirmed.

Sam D. Johnson
Justice

OPINION DELIVERED: December 31, 1976.

EXHIBIT D

IN THE SUPREME COURT OF TEXAS

NO. B-5887

GENERAL DYNAMICS CORPORATION,
Petitioner,

v.

BOB BULLOCK, COMPTROLLER, ET AL.,
Respondents

From Travis County, Third District

CONCURRING OPINION

I do not regard the Texas franchise tax as an income tax within the meaning of the Buck Act. The sales within the federal enclave are taken into account only to apportion the corporation's capital as between Texas and other jurisdictions. In that respect I agree with the dissent. For a similar reason I do not regard the franchise tax, or any part of it, as violative of Art. I § 8 of the United States Constitution. While Texas could not tax General Dynamics for the privilege of doing business within the enclave, Texas does and may properly tax General Dynamics for the privilege of doing business throughout the State. For that purpose the apportionment of the corporate capital may be made according to total statewide sales — including sales within the enclave. Werner Machine Co., Inc. v. Director of Taxation of

New Jersey, 350 U.S. 492 (1956); Educational Films Corp. v. Ward, 282 U.S. 379 (1930).

THOMAS M. REAVLEY
Associate Justice

OPINION DELIVERED: December 31, 1976.

EXHIBIT E

IN THE SUPREME COURT OF TEXAS

NO. B-5887

GENERAL DYNAMICS CORPORATION,
Petitioner,

v.

BOB BULLOCK, COMPTROLLER, ET AL.,
Respondents

From Travis County, Third District

DISSENTING OPINION

Under Article I, Section 8 of the U.S. Constitution, the Congress has the exclusive right to legislate over federal enclaves, such as the one in question. Taxation is accomplished by legislation; and, as I understand the Constitution, only the Congress can enact, or authorize, taxing legislation applicable to such enclaves.

The Congress has, in the Buck Act, authorized the collection by the states *only* of *income taxes* on revenues derived from the federal enclaves. The definition of "income tax" is broad; but it does not include a tax on capital. This Court made that distinction in *Humble Oil & Refining Co. v. Calvert,* 478 S.W.2d 926 (1972).

The substance of the tax here sought to be collected is upon the stated capital, surplus, and undivided profits of the corporation. The fact that the formula for the amount

of the tax which is to be paid has in it the factor of the amount of gross receipts does not, in my opinion, change it from a tax on capital into an income tax.

JOE R. GREENHILL
Chief Justice

Opinion delivered: December 31, 1976

EXHIBIT F

IN THE SUPREME COURT OF TEXAS

NO. B-5887

GENERAL DYNAMICS CORPORATION,
Petitioner,

v.

BOB BULLOCK, COMPTROLLER, ET AL.,
Respondents

From Travis County, Third District

DISSENT

Under Article I, Section 8 of the U.S. Constitution, the Congress has the exclusive right to legislate over federal enclaves, such as the one in question. Taxation is accomplished by legislation; and, as I understand the Constitution, only the Congress can enact, or authorize, taxing legislation applicable to such enclaves.

The Congress has, in the Buck Act, authorized the collection by the states *only* of *income taxes* on revenues derived from the federal enclaves. The definition of "income tax" is broad; but it does not include a tax on capital. This Court made that distinction in *Humble Oil & Refining Co. v. Calvert,* 478 S.W.2d 926 (Tex. 1972).

While in *Humble* the tax was called an "occupation tax," the tax was based upon the market value of oil and gas as produced. When oil and gas are produced and have

a value (as they do), there is an inflow of wealth, an accretion to wealth, and an economic gain. This, we said, "is the essence of an income tax." 478 S.W.2d at 931. We therefore concluded in *Humble* that the tax on this economic gain or inflow of wealth, by whatever name, was an "income tax" within the meaning of the Buck Act. We held that the oil and gas when produced, and upon which the tax was levied, "could be considered as the money, or money's worth, which comes during a definite period. *It is to be distinguished from capital,* which is a fund of wealth at a particular time."

The *substance* of the tax sought to be collected in *this* case is upon the stated *capital, surplus, and undivided profits* of the corporation. By no stretch of the imagination could it be said to be a tax on any inflow of wealth or upon economic gain.

The fact that the formula for the amount of the tax which is to be paid has in it the factor of the amount of gross receipts does not, in my opinion, change it from a tax on capital into an income tax.

JOE R. GREENHILL
Chief Justice

Opinion delivered December 31, 1976

EXHIBIT G

Art. 12.01 Base and Rate of Tax

(1) Except as herein provided, every domestic and foreign corporation heretofore or hereafter chartered or authorized to do business in Texas or doing business in Texas, shall file such reports as are required by Articles 12.08 and 12.19 and pay to the Comptroller a franchise tax for the period from May 1 of each year to and including April 30 of the following year which shall be based on whichever of the following Subsections (a), (b), or (c) shall yield the greatest tax:

(a) Basic Tax

(i) Two Dollars and Seventy-five Cents ($2.75) per One Thousand Dollars ($1,000) or fractional part thereof applied to that portion of the sum of the stated capital, surplus and undivided profits, the sum of which for the purposes of this Chapter is hereafter referred to as "taxable capital," allocable to Texas in accordance with Article 12.02 of this Chapter.

As used in this Chapter, the phrase "stated capital" shall have the same meaning as defined in Article 1.02 of the Texas Business Corporation Act. . . .

(ii) Tax on Debt. In addition to the franchise tax due and payable under Subsection (1) (a) (i) of Article 12.01 of this Chapter, there is hereby levied on all corporations paying a franchise tax under said Subsection (i) for the privilege of doing business in the corporate form during the periods listed below, an additional tax as follows:

For the Period from:	An additional tax for the year of:
May 1, 1968, to and including April 30, 1969,	$2.25
May 1, 1969, to and including April 30, 1970,	$2.00
May 1, 1970, to and including April 30, 1971,	$1.50
May 1, 1971, to and including April 30, 1972,	$1.00
May 1, 1972, to and including April 30, 1973,	$0.50

per One Thousand Dollars ($1,000) or fractional part thereof applied to that portion of taxable debt allocable to Texas.

For the purposes of this Subsection (1) (a) (ii), "Taxable Debt" shall mean outstanding bonds, notes and debentures, including all written evidences of indebtedness which bear a maturity date of one (1) year or more from date of issue and all such instruments which bear a maturity date of less than one (1) year from date of issue which represent indebtedness which has remained continuously outstanding for a period of one (1) year or more from date of inception whether or not said indebtedness has been renewed or extended by the issuance of other evidences of the same indebtedness to the same or other parties, but this term shall not include instruments which have been previously classified as surplus.

Taxable debt allocable to Texas shall be determined by using the same percentage used to allocate taxable capital to Texas under the provisions of Article 12.02.

The additional franchise tax levied by this Subsection (1) (a) (ii) shall expire after April 30, 1973.

(b) Two Dollars and Seventy-five Cents ($2.75) per One Thousand Dollars ($1,000) or fractional part thereof applied to the assessed values for County ad valorem tax purposes of the property owned by the corporation in this State.

(c) Thirty-five Dollars ($35).

(2) Corporations, other than those enjoying the use of public highways by virtue of a certificate of public convenience and necessity granted by the Railroad Commission of Texas, which are required by law to pay annually a tax upon intangible assets, and corporations incorporated only for the purpose of owning or operating street railways or passenger bus systems in any city or town and suburbs thereof, and corporations incorporated only for the purpose of maintaining or owning or operating electric interurban railways, and corporations, four-fifths (4/5) or more of whose assets are invested in, and four-fifths (4/5) or more of whose gross income is received from, voting common capital stock which comprises four-fifths (4/5) or more of the total fully voting common capital stock of one or more corporations which are public utility corporations under clause (3) hereof, shall be required hereafter to pay a franchise tax equal to one-fifth (1/5) of the franchise tax herein imposed against all other corporations under Subsections (1) (a) or (1) (b), but not less than the entire tax imposed by Subsection (1) (c) of this Article.

(3) Except as provided in preceding Subsection (2), all public utility corporations, which shall include any

such corporation engaged solely in the business of public utilities as defined by the laws of Texas whose rates or services are regulated, or subject to a regulation in whole or in part, by law, shall pay a franchise tax as provided in this Article which shall be based on whichever of the following shall yield the greatest tax:

(a) Two Dollars and Seventy-five Cents ($2.75) per One Thousand Dollars ($1,000) or fractional part thereof applied to that portion of the stated capital, surplus and undivided profits, allocable to Texas in accordance with Article 12.02 of this Chapter.

(b) Two Dollars and Seventy-five Cents ($2.75) per One Thousand Dollars ($1,000) or fractional part thereof applied to the assessed value for County ad valorem tax purposes of the property owned by the corporation in this State.

(c) Thirty-five Dollars ($35).

(4) Corporations engaged partly in the business of a public utility as defined in Subsection (3) of this Article and partly in business embraced in Subsection (1) of this Article shall pay the franchise tax in the following manner: as to those businesses which come under Subsection (1) the tax shall be computed as provided in Subsection (1) on that proportion of the entire taxable capital under said Subsection (1) as the Texas gross receipts from such business or businesses bear to the entire Texas gross receipts of such corporation; and to those businesses which come under Subsection (3) the tax shall be computed as provided in Subsection (3) on that proportion of the entire taxable capital under said Subsection (3) as the Texas gross receipts from such business or businesses

bear to the entire Texas gross receipts of such corporation. The period for which such gross receipts are taken shall be for the same period used in computing taxable capital allocable to Texas in accordance with Article 12.02 of this Chapter.

(5) A corporation now required to pay separate franchise tax for each purpose or business authorized by its charter shall hereafter pay only the tax provided hereunder for one purpose, and, until said corporation adopts the provisions of the Texas Business Corporation Act, it shall, in addition, pay one-fourth (¼) of such amount for each additional purpose named in its charter; provided, however, this Article shall not apply to corporations organized under the Electric Cooperative Corporation Act. Provided further, that this Article does not amend, alter, or change in anywise any provisions of Chapter 86, page 163, Forty-fifth Legislature, Acts 1937,[1] and provided further that nothing in this Article shall repeal any total exemption from franchise taxes now provided by law.

Acts 1959, 56th Leg., 3rd C.S., p. 187, ch 1. Amended by Acts 1961, 57th Leg., p. 182, ch. 97, § 1, eff. April 27, 1961; Acts 1967, 60th Leg., p. 849, ch. 359, § 1, eff. May 1, 1968; Acts 1968, 60th Leg., 1st C.S., p. 2, ch. 2, §§ 1, 2, eff. Oct. 1, 1968; Acts 1969, 61st Leg. p. 2366, ch. 801, § 1, eff. Sept. 1, 1969.

Art. 12.02 Allocation Formula

(1) (a) Each corporation liable for payment of a franchise tax shall determine the portion of its entire taxable capital taxable by the State of Texas by multiplying same by an allocation percentage which shall be the

1. Vernon's Ann. Civ. St., art. 1528b.

percentage relationship which the gross receipts from its business done in Texas bear to the total gross receipts of the corporation from its entire business.

(b) For the purpose of this Article, the term "gross receipts from its business done in Texas" shall include:

(i) Sales of tangible personal property when the property is delivered or shipped to a purchaser within this State, regardless of the F.O.B. point or other conditions of the sale, reduced by the deduction, if applicable, allowable under Subsection (c) of this Section (1);

(ii) Services performed within Texas;

(iii) Rentals from property situated, and royalties from the use of patents or copyrights, within Texas, and

(iv) All other business receipts within Texas.

(c) If any sales covered by Subsection (b) (i) of this Section (1) are sales of food or food products exempted from the Limited Sales, Excise and Use Tax under Section (L), Article 20.04, Title 122A, Taxation—General, Revised Civil Statutes of Texas, 1925, as amended, or drugs, medicines, or other products exempted under Section (M), Article 20.04 of that Title, as amended, then a deduction is allowable to the extent of sales of these exempted items shipped from outside the State of Texas.

If any provision of this Subsection (c) or the application thereof to any person, corporation, or circumstance is held invalid, such invalidity shall not affect other provisions or applications of this Article which can be given effect without the invalid provision or application, and to this end the provisions of this Subsection (c) are declared to be severable and the deduction inapplicable.

(d) For the purpose of this Article, the term "total gross receipts of the corporation from its entire business" shall include all of the proceeds of all sales of the corporation's tangible personal property, all receipts from services, all rentals, all royalties and all other business receipts, whether within or outside of Texas. Provided, however, that, as to the sale of investments and capital assets, the term "total gross receipts of the corporation from its entire business" shall include only the net gain from such sales.

(2) If the allocation and apportionment provisions of Section (1) of this Article do not fairly represent the extent of the taxpayer's business activity in Texas, the taxpayer may petition for and the Comptroller may permit, in respect to all or any part of the taxpayer's business activity, if reasonable:

(a) separate accounting;

(b) the inclusion of one or more additional factors which will fairly represent the taxpayer's business activity in Texas; or

(c) the employment of any other method to effectuate an equitable allocation and apportionment of the taxpayer's capital.

Acts 1959, 56th Leg., 3rd C.S., p. 187, ch. 1. Amended by Acts 1961, 57th Leg., 1st C.S., p. 71, ch. 24, art. II, § 1, eff. Sept. 1, 1961; Acts 1969, 61st Leg., 2nd C.S., p.___, ch. 1, art. 7, § 1, eff. May 1, 1970.

FILED
JUL 11 1977
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

* * *

OCTOBER TERM, 1976

* * *

NO. 76-1645

* * *

GENERAL DYNAMICS CORPORATION,
Petitioner

V.

BOB BULLOCK, COMPTROLLER OF PUBLIC ACCOUNTS, ET AL.,
Respondents

* * *

On Petition For A Writ of Certiorari To The Supreme Court of Texas

* * *

BRIEF FOR RESPONDENT IN OPPOSITION

* * *

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IN THE

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* * *

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NO. 76-1645

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V.

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Respondents

* * *

On Petition For A Writ of Certiorari
To The Supreme Court of Texas

* * *

BRIEF FOR RESPONDENT IN OPPOSITION

* * *

OPINIONS BELOW

The opinion of the Supreme Court of Texas is reported at 547 S.W.2d 255 and is reproduced as Exhibit C in the Petition, with a concurring opinion reproduced as Exhibit D and a dissenting opinion as Exhibit E in the Petition. A revised dissent is reported at 547 S.W.2d 259, along with the overruling of the motion for rehearing, and is reproduced as Exhibit F in the Petition.

The opinion of the Austin court of Civil Appeals is

reported at 533 S.W.2d 118 and is reproduced as Exhibit B in the Petition.

The judgment of the district court of Travis County, Texas, 98th Judicial District, is reproduced as Exhibit A in the Petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition, but Respondent denies that the state's collection of the tax in question is in violation of Article I, Section 8, Clause 17, of the Constitution of the United States.

ISSUES PRESENTED

1. IS THE STATE'S COLLECTION OF A FRANCHISE TAX ON THE BASIS OF A FORMULA THAT INCLUDES BUSINESS CONDUCTED IN A FEDERAL ENCLAVE WITHIN THE STATE VIOLATIVE OF ARTICLE I, SECTION 8, CLAUSE 17, OF THE CONSTITUTION OF THE UNITED STATES?

2. IS THE TEXAS FRANCHISE TAX A TAX "LEVIED ON, WITH RESPECT TO, OR MEASURED BY, NET INCOME, GROSS INCOME, OR GROSS RECEIPT" WITHIN THE BUCK ACT, 4 U.S.C. §§106(a) AND 110 (c)?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Petition at pages 3-5 adequately sets forth the applicable provisions of Article I, Section 8, Clause 17, Constitution of the United States, the Buck Act, 4 U.S.C.

§§106(a), 110(c), and the Texas franchise tax, Texas Taxation-General, Articles 12.01, 12.02.

STATEMENT OF THE CASE

Generally, Petitioner's statement of the facts and nature of this case is adequate.[1]

REASONS FOR NOT GRANTING THE WRIT

This Court has firmly established that a nondiscriminatory tax on corporate franchises is valid, notwithstanding the inclusion of tax exempt property or income in the measure of it. *Werner Machine Co., Inc. v. Director of Division of Taxation, Department of Treasury, New Jersey*, 350 U.S. 492 (1956); *Educational Films Corp. v. Ward*, 282 U.S. 379, 392 (1931); *Flint v. Stone Tracy Co.*, 220 U.S. 107, 162 (1910). The Texas franchise tax has been upheld by this Court, *Ford Motor Company v. Beauchamp*, 308 U.S. 331 (1939), and is not violative of Article I §8 of the United States Constitution in this case because Texas may reasonably measure its tax according to total statewide sales including sales within a federal enclave. Insofar as Petitioner's contentions turn on the interpretation of the Texas franchise act, the correctness of the decision of the highest court of the state does not warrant review by this Court. *Gurley v. Rhoden*, 421 U.S. 200 (1975); *McLeod v. Dilworth Co.*, 322 U.S. 327, 328-330 (1944).

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[1]Respondents, however, must take strong exception to Petitioner's effort to belatedly introduce evidence in this case through footnotes numbers two and three on pages six and seven of the Petition. Although Respondents do not feel the figures, if accurate, are material to the issues in this case, we cannot allow to go unchallenged the effort by Petitioner to introduce evidence on appeal. If the figures are material, evidence supporting them should have been introduced at the appropriate stage of these proceedings when contrary evidence, if any, could also have been introduced and a finding of fact entered.

Computation of the Texas franchise tax on the basis of income realized by Petitioner, the General Dynamics Corporation, from its sales on a federal enclave in Texas also is permissible under the Buck Act, 4 U.S.C. §104, *et seq.* General Dynamics Corporation does not contend that the tax falls on an instrumentality of the United States; nor does it contend that assets or property of the corporation located on a federal enclave cannot be considered in computing the Texas franchise tax. Petitioner's sole complaint is that its income from sales on a federal enclave in Texas cannot be used in computing the Texas tax. This contention is in conflict with the intent of Congress that the Buck Act be remedial legislation and broadly construed, as is made clear in the Report of the Senate Committee on Finance:

> "Subsection (c) defines the term 'income tax' to mean any tax levied on, with respect to, or measured by, net income, gross income, or gross receipts. This definition, as well as the preceding definition of sales or use tax, must of necessity cover a broad field because of the great variations to be found between the different State laws. *The intent of your committee in laying down such a broad definition was to include any State tax (whether known as a corporate-franchise tax, or business-privilege tax, or by an other name) if it is levied on, with respect to, or measured by net income, gross income, or gross receipts.*"
>
> S. Rep. No. 1625, 76th Cong., 3rd Sess., at 5 (1940) (Emphasis added)

This Court in *Howard v. Commissioners of Sinking Fund of City of Louisville*, 344 U.S. 624 (1953), has emphasized that:

> "The grant . . . given within the definition of the Buck Act . . . was for *any tax* measured by, net income, gross income, or gross receipts."
>
> 344 U.S. at 629 (emphasis supplied by this Court)

The Texas franchise tax is a tax levied for the privilege of carrying on business in Texas and is measured by income or gross receipts. In *Southern Realty Corporation v. McCallum*, 65 F.2d 934, 935-36, *cert. denied* 290 U.S. 692 (1933) the court indicated:

> "The [corporate franchise] tax is not laid on property or on income, though both are regarded in measuring it."

This description is consistent with the description of the same tax provided by this Court in *Ford Motor Co. v. Beauchamp, supra* at 332.[2] Furthermore, treatment of an economic benefit, such as a franchise, as income is supported by decisions of this Court. *See Philadelphia Park Amusement Co. v. United States*, 126 F.Supp. 184 (Ct. Cl. 1954); *Baxter v. C.I.R.*, 443 F.2d 757 (9th Cir. 1970); *United States v. Hardy*, 74 F.2d 841 (4th Cir. 1935); *Elston Co. v. United States*, 21 F.Supp. 267 (Ct. Cl. 1937).

Petitioner's reliance on cases such as *Humble Pipe Line Co. v. Waggoner*, 376 U.S. 369 (1964) and *Board of Equalization of the City and Independent School District of Forth Worth v. General Dynamics Corporation*, 344

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[2]Petitioner incorrectly states that this Court in *Ford Motor Co. v. Beauchamp*, held that the Texas franchise tax is a tax on capital. In the aforementioned case, this Court correctly described the Texas franchise tax realizing the importance of both capital and gross receipts in finally measuring the tax. *Id.* at 332. However, only the use of capital located outside of Texas was at issue in the case.

S.W.2d 489 (Tex.Civ.App.-Fort Worth, 1961, writ ref'd n.r.e.) is misplaced because both cases involve the levy of property taxes, not the Texas franchise tax. The court in *Mississippi River Fuel Corporation v. Cocreham*, 382 F.2d 929 (5th Cir. 1967) *cert denied*, *Mouton v. Mississippi River Fuel Corporation*, 390 U.S. 1014 (1968), was considering a tax different from the Texas franchise tax, reached the issue of the Buck Act only in passing, and has had its opinion distinguished in *Humble Oil & Refining Company v. Calvert*, 478 S.W.2d 926, 932 (Tex.) *cert. denied*, 402 U.S. 967 (1972).

CONCLUSION

The decision of the Texas Supreme Court in this case should be sustained because it is a correct determination of applicable law and consistent with the holdings of this Court. Texas may reasonably measure its franchise tax according to gross receipts from total statewide sales, including gross receipts from sales within a federal enclave.

PRAYER

Respondent, therefore, prays that the petition of General Dynamics Corporation for writ of certiorari be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Lonny F. Zwiener, Assistant Attorney General of the State of Texas, do hereby certify that a true and correct copy of the above and foregoing Brief for Respondent in Opposition has been placed in the United States Mail, postage prepaid, certified, return receipt requested, to Ms. Mary Joe Carroll, Attorney at Law, P.O. Box 1148, Austin, Texas 78767, on this the 7th day of July, 1977.

LONNY F. ZWIENER

Supreme Court, U. S.
FILED
JUL 21 1977
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IN THE

Supreme Court of the United States

OCTOBER TERM 1976

NO. 76-1645

GENERAL DYNAMICS CORPORATION,
Petitioner

v.

BOB BULLOCK, COMPTROLLER OF PUBLIC ACCOUNTS, ET AL.,
Respondents

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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IN THE

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GENERAL DYNAMICS CORPORATION,
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BOB BULLOCK, COMPTROLLER OF PUBLIC ACCOUNTS, ET AL.,
Respondents

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

The following reply is respectfully presented in accordance with the authority granted petitioner by Paragraph 4 of Rule 24 of this Honorable Court.

(1) Petitioner made no attempt to introduce new evidence.

In their first footnote respondents "take strong exception" to what they assert to be petitioner's effort to in-

troduce new evidence through footnotes 2 and 3 in the petition for certiorari. The only reasonable explanation for such a charge is the "recent change in assignments of attorneys" which prompted respondents to request and this Court to grant an extension of time for the filing of the reply brief. The information in the two footnotes comes from the stipulations upon the basis of which the case was initially tried. The figures shown in footnote 2 are set out in stipulation 8. The columns at the beginning of footnote 3 are taken from stipulation 9. The concluding paragraph of footnote 3 contains only mathematical computations based upon the previously listed stipulated amounts. The utilization of figures stipulated into evidence to derive percentages is not the introduction of new evidence.

(2) Petitioner did not attack the constitutionality of the Texas franchise tax statutes.

The first three cases cited by respondents, *Werner Machine Co. v. Director of Division of Taxation, Department of Treasury, New Jersey*, 350 U.S. 492 (1956); *Educational Films Corp. v. Ward*, 232 U.S. 373 (1931); and *Flint v. Stone Tracy Co.*, 220 U.S. 107 (1910), do no more than uphold the validity of various franchise tax provisions. The constitutionality of the Texas statutes has never been in issue here. That question was conclusively settled by this Court's decision in *Ford Motor Company v. Beauchamp*, 308 U.S. 331 (1939). It is equally significant to note that none of respondents' cited cases involves the Buck Act which is central to both questions raised by the application for certiorari here pending.

(3) This Court's decision on the Texas franchise tax is not subject to construction of the tax as being one "measured by income."

In *Ford Motor Company v. Beauchamp*, 308 U.S. 331 (1939), this Court in upholding the Texas franchise tax wrote (308 U.S. 375):

> "When that charge [payment for the privilege of carrying on business], as here, is based upon the proportion of the capital employed in Texas, calculated by the percentage of sales which are within the state, no provision of the Federal Constitution is violated."

That holding clearly construes the taxing provisions (Exhibit G to Application) as meaning that income is utilized only as a means of deriving the fraction or proportion or allocation percentage of a corporation's entire capital which can lawfully be taxed by the State of Texas: Gross receipts from business done in Texas divided by total gross receipts produces the fraction or percentage by which is determined the portion of the corporation's entire taxable capital which is taxable by the State of Texas. This Court so explained the tax in more detail on the basis of the particular figures involved in the reported case (308 U.S. 333-335). The tax is levied on the corporation's capital, not on its income. That conclusion is further enforced by this Court's initial description of the franchise tax as being (308 U.S. 332):

> "Measured by a graduated charge upon such proportion of the outstanding capital stock, surplus and undivided profits of the corporation, plus its long term obligation, as the gross receipts of its

> Texas business bear to the total gross receipts from its entire business."

Contrary to respondents' assertion (Ftn. 2), the above quoted language is not susceptible to construction of the franchise tax as being "measured by gross receipts." Moreover, at a later point in the opinion it was specifically held that the tax is "measured by capital whereever located" (308 U.S. 336). The basic provisions of the tax remain the same. The change is in the position of the respondents. In their defense of the franchise tax, the state officials at the time of the reported case conceded that they had no right to tax receipts from other states. This Court so noted (308 U.S. 337):

> "In so far as it was upon receipts in other states for work done in other states, it was conceded to be outside of the taxing power of the statute."

In the case at bar, however, respondents have added income from business done outside the State—on a Federal enclave—to income from business done within Texas in order to increase the fraction or percentage of petitioner's taxable capital which they assert is taxable by the State of Texas. It is at that point that the question of constitutionality arises.

(4) The Buck Act does not authorize the State to collect all types of franchise taxes on Federal enclaves.

Neither the Report of the Senate Committee on Finance (S. Rep. No. 1625, 76th Cong., 3rd Sess. 1940) nor *Howard v. Sinking Fund of the City of Louisville*, 344 U.S. 624 (1953), can properly be construed as interpreting the Buck Act to permit the collection of any and all categories of franchise taxes. Both the report and the opinion in their discussions of the Buck Act authorization of "income tax" emphasize that to qualify as an income tax the tax must be "levied on, with respect to, or measured by net income, gross income, or gross receipts."

As has been shown above, this Court has held that the Texas franchise tax is "measured by capital." Respondents, therefore, have been forced to rely almost entirely upon a single excerpt from *Southern Realty Corporation v. McCallum*, 65 F.2d 934, 935-936 (5th Cir. 1933), cert. den. 290 U.S. 692, where the Court stated that the "tax is not laid on property or on income, though both are regarded in measuring it." The apparent support of respondents' contention is semantic rather than legal. That the word "measuring," as applied to income, was used in that sentence solely with reference to the computation of the fraction or percentage of taxable capital to be taxed by the State is made abundantly clear by reading the sentence in context with the Court's immediately following explanation (65 F.2d 935-936):

> "The tax is not laid on property or on income, though both are regarded in measuring it. It is laid on the privilege granted to the corporation, whether domestic or foreign, to do business for one year in Texas with the capital set-up which it has chosen to use. The tax for this opportunity to do the year's business *is directly measured by the business capital about to be used, rather than by the income which it may afterwards appear was realized.*" (Emphasis added.)

Prior to the case at bar no Court, State or Federal, ever construed the Texas franchise tax as being levied on, with respect to, or measured by net income, gross income, or gross receipts.

(5) What is an "income tax" within the meaning of the Buck Act is a question of Federal—not State—law.

Respondents seek to prevent granting of the writ by taking the position that the correctness of the Texas Supreme Court's chacterization of the State franchise tax does not merit review by this Court. The cited cases, *Gurley v. Rhoden,* 421 U.S. 200 (1975), and *McLeod v. Delworth,* 322 U.S. 327 (1944), are not in point here except to the extent that they hold that this Court is the "final arbitor" when the meaning or the application of a State statute affects a subject of Federal jurisdiction. That clearly is the situation here. The Texas Supreme Court has made a distorted and strained interpretation of the franchise tax for the sole purpose of characterizing it as an "income tax" within the meaning of the Buck Act. That circumstances makes directly applicable the following holding from *Carpenter v. Shaw,* 280 U.S. 363, 367-368 (1930):

> "Where a federal right is concerned we are not bound by the characterization given to a state tax by state courts or Legislatures, or relieved by it from the duty of considering the real nature of the tax and its effect upon the federal right asserted."

Later decisions to the same effect include *Storaasli v. Minnesota,* 283 U.S. 57 (1931); *Society for Savings v. Bowers,* 349 U.S. 143 (1955); *California v. Buzard,* 382 U.S. 386 (1966); and *Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469 (1975).

(6) The income tax cases cited by respondents more nearly refute than support the contention made.

The four lesser Federal Court decisions attributed by respondents to "this Court" do not equate a franchise within income. To the contrary in each instance the franchise or license was treated as a purchased asset. In *Elston Co. v. United States,* 21 F.Supp. 267 (Ct. Cl. 1937), and *United States v. Hardy,* (4th Cir. 1935), the Courts held that purchased liquor authorities terminated by national prohibition should be treated as any other lost properties in computing Federal income taxes. Those holdings were applied to an amusement park franchise in *Philadelphia Park Amusement Co. v. United States,* 126 F.Supp. 184 (Ct. Cl. 1954). In *Baxter v. C.I.R.,* 433 F.2d 757 (9th Cir. 1970)—erroneously cited as 443 F.2d 757—franchises were treated as business assets and salable properties. Those holdings are all in accord with this Court's statement in the *Ford Motor Company* case that the Texas franchise tax is "payment for the privilege of carrying on business" (308 U.S. 334). Since the taxpayer is making "payment" for a business asset, it cannot logically be held that it is at the same time being taxed on its "income." The concept that anything acquired by "payment" can concurrently be "income" and be taxed as such is beyond the normal understanding of reasonable men. Unquestionably the Buck Act definition of "income tax" is in broad language, but despite

its breadth, it never has been and logically cannot be interpreted so broadly as to include a tax imposed for a "privilege" acquired by "payment." If Congress had intended to permit the States to levy taxes on franchises utilized on Federal enclaves, it could and would have plainly so stated in the Buck Act.

(7) Respondents disregard the "exclusive jurisdiction" of Congress.

The only Buck Act cases even mentioned in respondents' brief are those cited by petitioner in its application as either directly or indirectly—because of the difference in the taxes involved—supporting its contention here. Respondents' attempted distinctions are meritless. The nature of a Federal enclave and the tests of the State's taxing power are the same or substantially the same regardless of the subdivision of the Buck Act upon which the taxing authority seeks to rely.

CONCLUSION

The decision of the Court below has not been and cannot be supported by any illegal authority. That Court has, nevertheless, assumed to decide a significant, substantial Federal question in a manner which is totally inconsistent with this Court's most applicable decisions. The Congress rather than the Texas Supreme Court has the right, power and authority to relinquish exclusive jurisdiction over Federal enclaves. Petitioner, therefore,

prays as before that this petition for writ of certiorari be granted.

Respectfully submitted

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Attorneys for Petitioner

CERTIFICATE OF SERVICE

I, Mary Joe Carroll, a member of the Bar of the Supreme Court of the United States, hereby certify that I have served the foregoing Petitioner's Reply to Respondents' Brief in Opposition on counsel for respondents by depositing same in the United States mail, postage prepaid, on July _____, 1977, addressed to The Honorable John L. Hill, Attorney General of Texas, and to Messrs. David M. Kendall, Steve Bickerstaff, and Lonnie F. Zwiener, Assistant Attorneys General, P. O. Box 12548, Capitol Station, Austin, Texas 78711.

MARY JOE CARROLL

Supreme Court, U. S.
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No. 76-1645

In the Supreme Court of the United States

OCTOBER TERM, 1977

GENERAL DYNAMICS CORPORATION, PETITIONER

v.

BOB BULLOCK, COMPTROLLER OF PUBLIC ACCOUNTS OF THE STATE OF TEXAS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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In the Supreme Court of the United States

OCTOBER TERM, 1977

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GENERAL DYNAMICS CORPORATION, PETITIONER

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PUBLIC ACCOUNTS OF THE STATE OF TEXAS, ET AT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's request for the views of the United States with respect to this case.

QUESTION PRESENTED

The State of Texas has a franchise tax on the privilege of doing business in the State measured by a portion of the capital of each corporation conducting business within its borders. The portion of capital allocable to Texas is measured by a formula multiplying total capital by the fraction formed by gross receipts from Texas over total gross receipts.

The question presented is whether the inclusion in Texas gross receipts of gross receipts from business conducted in a federal enclave within Texas violates Article I, Section 8, Clause 17 of the Constitution, which

provides that "Congress shall have Power * * * [t]o exercise exclusive legislation * * * " over areas ceded to the federal government by particular states.

CONSTITUTION PROVISION AND STATUTES INVOLVED

Article I, Section 8, Clause 17 of the Constitution and the pertinent parts of the Buck Act (4 U.S.C. 110) and the Texas franchise tax, Articles 12.01 and 12.02, Texas Taxation—General Statutes Annotated (1969), are set forth at pp. 3-5 of the petition.

STATEMENT

Petitioner is a corporation engaged primarily in the manufacture and sale of defense equipment and supplies. During 1968-1971, the taxable years at issue, it conducted business at various locations within the State of Texas, including a 428-acre federal enclave known as Air Force Plant No. 4 (Pet. Ex. B 23-24).

Texas has a franchise tax on the privilege of doing business in the State measured by the capital of every domestic and foreign corporation conducting business within its borders. In order to measure the portion of capital allocable to Texas, Article 12.02(1)(a) of the franchise tax statute provides a formula, pursuant to which total capital is multiplied by the fraction formed by gross receipts from Texas business over total gross receipts (see Pet. 5).

Petitioner brought this suit in the district court of Travis County, Texas, to recover more than $2 million in franchise taxes on the ground that the gross receipts from the business conducted within the federal enclave could not constitutionally be included in the franchise tax allocation formula. The district court upheld petitioner's claim and awarded judgment of $2,008,757.11 (Pet. Ex. A 21-22; Pet. Ex. B 23-24).

The Texas Court of Civil Appeals reversed (Pet. Ex. B 23-28). It held that the Texas franchise tax was an "income tax" within the meaning of the Buck Act, 4 U.S.C. 110(c). It therefore concluded that Congress had approved the inclusion of the gross receipts from business operations within a federal enclave in a state tax allocation formula (Pet. Ex. B 26-27).

In a divided decision, the Texas Supreme Court affirmed (Pet. Ex. C 29-36; Pet. Ex. D 37-38; Pet. Ex. E 39-40; Pet. Ex. F 41-42). The majority agreed with the Court of Civil Appeals that the franchise tax formula properly took petitioner's gross receipts from the federal enclave into account because the tax was an "income tax" as defined by the Buck Act. In a concurring opinion, Associate Justice Reavley concluded that the tax was valid because there was no constitutional prohibition against the inclusion of petitioner's gross receipts from its business within the federal enclave. However, he disagreed with the majority's determination that the franchise tax qualified as an income tax under the Buck Act (Pet. Ex. D 37-38). Chief Justice Greenhill dissented on the ground that the franchise tax was not an income tax under the Buck Act and that the inclusion of the gross receipts from the federal enclave was barred by Article I, Section 8, Clause 17 of the Constitution (Pet. Exs. E and F 39-42).

ARGUMENT

Article 12.01 of the Texas Franchise Tax Statute subjects every domestic and foreign corporation doing business in Texas to an annual franchise tax measured by the portion of its "taxable capital" that is allocable to Texas. Pursuant to Article 12.02, that portion is computed by multiplying the corporation's total capital by a fraction, the numerator of which is the corporation's gross

receipts from business done in Texas and the denominator of which is the corporation's total gross receipts.[1]

Petitioner argues (Pet. 15-19) that Texas could not constitutionally regard the gross receipts from business done within the federal enclave as gross receipts from Texas business for purposes of the franchise tax allocation formula because that enclave was not part of Texas. In petitioner's view, inclusion of its gross receipts from its enclave operations in the allocation formula is tantamount to a state tax upon petitioner's activities within the enclave and is therefore contrary to the exclusive federal jurisdiction in that area conferred by Article I, Section 8, Clause 17 of the Constitution.[2] See *Surplus Trading Co.* v. *Cook*, 281 U.S. 647; *Standard Oil Co.* v. *California*, 291 U.S. 242. Petitioner further argues (Pet. 16-17) that the Texas franchise tax cannot be characterized as an "income tax" within the meaning of the consent provisions of the Buck Act, 4 U.S.C. 110(c), and that the decision below erred in so holding.

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[1]Article 12.01(a)(1) imposes the tax on "taxable capital," which it defines as the sum of stated capital, surplus and undivided profits. During the years in issue, the prescribed rate was $2.75 per $1,000 of taxable capital. The statute also provides an alternative method of computing the franchise tax based on the assessed value of the corporation's property in the state. However, the alternative computation is applicable only where it yields a higher tax, which was not the case here.

[2]Article I, Section 8, Clause 17 provides:

> The Congress shall have Power * * * [t]o exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts Magazines, Arsenals, dock-Yards and other needful buildings; * * *

1. We agree with petitioner that the Texas franchise tax is not an "income tax" within the meaning of the Buck Act, 4 U.S.C. 110(c). As the Court most recently explained in *United States* v. *Mississippi Tax Commission*, 421 U.S. 599, 611, the Buck Act was enacted in 1940 to bar the federal government from asserting tax immunity on the ground that "the Federal Government has exclusive jurisdiction over the area where the transaction occurred." S. Rep. No. 1625, 76th Cong., 3d Sess. 2 (1940). Section 106(a) of the Buck Act provides that "[n]o person shall be relieved from liability for any income tax levied by any State * * * by reason of his residing within a Federal area or receiving income from transactions occurring * * * in such area * * * " (4 U.S.C. 106(a)). Section 110(c) defines the term "income tax" as "any tax levied on, with respect to, or measured by, net income, gross income, or gross receipts."

The Texas franchise tax is not an "income tax" within the meaning of the Buck Act. While the definition of "income tax" in Section 110(c) is broadly cast, it is not so elastic that it can be stretched to cover every conceivable tax. See, *e.g.*, *Mississippi River Fuel Corp.* v. *Cocreham*, 382 F. 2d 929 (C.A. 5), certiorari denied *sub nom. Mouton* v. *Mississippi River Fuel Corp.*, 390 U.S. 1014; *Johnson* v. *City and County of Denver*, 186 Colo. 398, 527 P. 2d 883.

Here, as this Court long ago recognized in *Ford Motor Co.* v. *Beauchamp*, 308 U.S. 331, the Texas corporate franchise tax is based on and measured by the amount of the corporation's capital and not its income or gross receipts. Pursuant to Article 12.01(a), the measure of the tax is a flat fee for each $1,000 of taxable capital, *i.e.*, capital allocable to Texas. Although the corporation's gross receipts are used to determine what percentage of its

total capital is allocable to its Texas business and thus taxable under the statute, that fact does not make the tax one that is measured by gross receipts. Indeed, an increase or decrease in a corporation's total gross receipts will produce no corresponding increase or decrease in its franchise tax liability as long as the proportion of the total receipts that is attributable to its receipts from business done in Texas remains constant. Thus, the majority erred in holding that the franchise tax was an "income tax" under the Buck Act.

2. The statutory allocation formula nevertheless may constitutionally include the gross receipts from petitioner's operations within the federal enclave.

a. It is undisputed that Air Force Plant No. 4 is subject to the exclusive jurisdiction of the United States. See *Board of Equalization* v. *General Dynamics Corp.*, 344 S.W.2d 489 (Tex. Civ. App.). Since Force Plant No. 4 is an exclusive jurisdiction federal enclave, it is clear that Texas could not impose a tax on property located or business conducted within that enclave. *Surplus Trading Co.*, v. *Cook, supra; Standard Oil Co.* v. *California, supra.* Nor can a state regulate transactions or activities that occur within areas over which the federal government exercises exclusive jurisdiction unless Congress specifically authorizes such state regulation. See, *e.g.*, *Paul* v. *United States*, 371 U.S. 245, 263-270.

But the area comprising the federal enclave did not cease to be a part of the State of Texas upon its cession to the United States. In *Howard* v. *Commissioner*, 344 U.S. 624, the City of Louisville, Kentucky, annexed certain territory over which the United States previously had acquired exclusive jurisdiction through condemnation

proceedings undertaken with the consent of the Kentucky legislature. The annexation was subsequently challenged on the ground that the area ceased to be a part of Kentucky when the United States acquired exclusive jurisdiction over it. The Court, however, rejected that contention, stating (*id.* at 626-627):

> When the United States, with the consent of Kentucky, acquired the property upon which the Ordnance Plant is located, the property did not cease to be part of Kentucky. • • • The fiction of a state within a state can have no validity to prevent the state from exercising its power over the federal area within its boundaries, so long as there is no interference with the jurisdiction asserted by the Federal Government.

Under *Howard*, it would appear that there is no bar against considering petitioner's gross receipts from its enclave operations to be part of its gross receipts from Texas business.

b. Thus, the only remaining question is whether the inclusion in the allocation formula of petitioner's gross receipts from the enclave violates Article I, Section 8, Clause 17 of the Constitution.

While this Court has never squarely ruled on the issue, there are analogous decisions that appear to support inclusion of the enclave gross receipts in the franchise tax formula.

In an analogous context, the Court in *Werner Co.* v. *Director of Taxation*, 350 U.S. 492, upheld a state franchise tax the measure of which included tax-exempt federal obligations. The Court observed that it had "consistently upheld franchise taxes measured by a yardstick which includes tax-exempt income or property,

even though a part of the economic impact of the tax may be said to bear indirectly upon such income or property" (350 U.S. at 494). See also *Flint* v. *Stone Tracy Co.*, 220 U.S. 107; *Educational Films Corp.* v. *Ward*, 282 U.S. 379; *Pacific Co.* v. *Johnson*, 285 U.S. 480.

If, as the Court held in *Werner Co.*, *supra*, a state may impose a corporate franchise tax measured by exempt income or property, one could argue that Texas may indirectly take gross receipts from the federal enclave into account in an apportionment formula to determine the amount of corporate capital allocable to the state.

The concurring opinion of Associate Justice Reavley relied upon these authorities. In his view (Pet. Ex. D 37-38), while Texas could not impose a tax on the privilege of doing business within the enclave, it could properly tax the privilege of doing business throughout the State. As a means of allocating capital to Texas, the State could take into account total Texas sales, including sales within the enclave.

Finally, *Harvester Co.* v. *Evatt*, 329 U.S. 416, offers another useful analogy. There, in upholding an Ohio franchise tax that took interstate sales into account in computing the Ohio business factor in an apportionment formula, the Court observed that "[a] state's tax law is not to be nullified merely because the result is achieved through a formula which includes consideration of interstate and out-of-state transactions in relation to the intrastate privilege" (329 U.S. at 423).

c. At all events, the decision below is the first appellate ruling on the question whether gross receipts from a business conducted within a federal enclave may be included in an allocation formula of a state tax not covered by the Buck Act. Since the only arguably correct basis for the decision below was the concurring opinion of

a single justice of the Texas Supreme Court on a ground that was not argued by the State, we believe that it would be appropriate for other appellate courts to consider more fully the question prior to plenary review by this Court. There is accordingly no present need for the Court to rule on the issue.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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